United States Circuit Court of Appeals,

EIGHTH CIRCUIT.

NO. 11,609.

Civil.

SOUTHERN RAILWAY COMPANY, a Corporation,
Appellant,

vs.

CLARENCE A. STEWART, Administrator of the Estate of
JOHN R. STEWART, Deceased,
Appellee.

Appeal from the District Court of the United States
for the Eastern District of Missouri.

APPELLEE'S PETITION FOR A REHEARING.

Comes now appellee in the above-entitled cause and files this, his petition for a rehearing of said cause, and prays that the Court grant appellee a rehearing of said cause, and as grounds for his said petition states that the Court, in its opinion herein, has inadvertently overlooked material matters of law and fact, as shown by its opinion, as follows:

This Honorable Court, in its opinion herein, has ruled and held that the following portion of the trial court's charge to the jury is erroneous and prejudicial, namely:

> "You are instructed that it was the duty of deceased, in the performance of his work, before going between the cars mentioned in the evidence, to couple the same, to use the device mentioned in the evidence known as the pin lifter, extending on the outside of the car, **and in the absence of any evidence that he did not use the pin lifter, the law presumes that he did use the pin lifter before going between the ends of the cars**, if you find he did go between the ends of the cars."

The Court has held that this portion of the charge is prejudicially erroneous because alone of the inclusion therein of the words emphasized above; and because thereof this Honorable Court has ordered and adjudged that the judgment below be reversed and the cause remanded for a new trial.

Appellee respectfully submits that, in so ruling and holding, this Honorable Court has inadvertently overlooked material, vital matters of law and fact, decisive of this phase of the case. The Court in its opinion, on page 13 thereof, holds that this portion of the trial court's charge is erroneous "for the reason that it is inconsistent with the burden of proof imposed by law upon a plaintiff." And in this connection the Court quotes from the opinion of the Supreme Court in Looney v. Metropolitan R. Co., 200 U. S. 480, 487, 488, where, in an action for death, there was no substantial evidence that the deceased employee came to his death through any negligence on the part of the defendant, and the Court, in considering whether the plaintiff had made a prima facie case, made the axiomatic statement that "negligence of defendant will not be inferred from the mere fact that the injury occurred, or

from the presumption of care on the part of the plaintiff"; saying, also, that "a presumption in the performance of duty attends the defendant as well as the person killed." In so holding, and in quoting from the Looney case, this Honorable Court, appellee respectfully submits, has, for one thing, **inadvertently overlooked the fact that this criticised portion of the charge below did not relate at all to the burden of proof, nor was it so drawn as to give the jury the impression that a breach of duty on the part of the defendant could be inferred from a presumption that the deceased used the pin lifter before going between the cars.**

In that portion of the charge quoted above, the Court began by referring to the duty which the Court considered was upon the deceased to try to use the pin lifter, that is, to give the appliance a proper trial, before going between the cars. It was not necessary for the Court in its charge to advert to that matter at all. The charge would have been proper and complete had all reference thereto been omitted. In Lovett v. Kansas City Terminal Railway Co., 316 Mo. 1246, an instruction was attacked for failure to require the jury to find that "the plaintiff gave the automatic appliance a proper trial," but the Supreme Court of Missouri, in upholding the instruction, said:

> "The ultimate fact that was to be submitted to the jury for their finding was that the car was not equipped with a coupler which could be uncoupled 'without the necessity of men going between the cars' and that the instruction did."

In the instant case the Court, by its charge, explicitly and repeatedly required the jury to find, as a predicate of liability, that the car in question was not equipped with a coupler that could be coupled without the necessity of men going between the cars. But the Court also charged the

jury as to the duty on the part of the deceased to use the pin lifter before going between the cars; and in that connection told the jury, in substance, that, **in the absence of any evidence to the contrary**, it would be presumed that the deceased performed such duty.

It cannot be doubted, we submit, that, **in the absence of anything to show the contrary**, the law presumes that one was in the performance of such duty or in the exercise of such care as the particular circumstances of the situation required of him at the time. Such presumption finds application to a great variety of situations (Worthington v. Elmer, 206 F. 306, 308; New England Portland Cement Co. v. Hatt, 231 F. 611, 617). And we further submit that where there is no evidence tending to rebut or repel such a presumption, it is not error to acquaint the jury with the fact that such presumption exists and to authorize them to reckon with it. **Such a presumption is very much like the presumption against suicide.** And where the issue is whether a deceased came to his death by accidental means or by suicide, the rule is that, **in the absence of evidence tending to show that the death was not accidental, the presumption against suicide does not cease when the case is sent to the jury but remains in the case, and it is not error for the Court to advise the jury of the existence of such presumption and permit the jury to reckon therewith** (Travelers Ins. Co. v. McConkey, 126 U. S. 661; N. Y. Life Ins. Co. v. Gamer, 303 U. S. 161). In the McConkey case, supra, the Supreme Court held that the trial court did not err "in saying to the jury that upon the issue as to suicide the law was for the plaintiff, unless that presumption was overcome by competent evidence"; saying that the burden placed upon the plaintiff in the case did not deprive her "of the benefit of the rules of law established for the guidance of courts and juries in the investigation and determination of facts." And in the later Gamer case the

Court, though holding the instruction there erroneous because in that case there **was** evidence tending to dispel the presumption, considered the McConkey case, did not overrule it, but held that the opinion therein is consistent with the theory upon which the Gamer case was ruled.

And in this connection it may be noted that in **New York Life Ins. Co. v. Brown (5th Cir.), 39 F. (2d) 376,** the Court, in an action on a policy of accident insurance, held that the trial court did not err in instructing the jury that if the evidence was **evenly balanced** on the issue of accidental death or suicide, the presumption against suicide would govern, but that if the evidence showed the jury the truth then to "follow the truth and leave the presumption."

In the instant case **there was no evidence that Stewart did not undertake to use the pin lifter before going between the cars; no evidence that he did not perform whatever duly rested upon him in that connection.** And consequently the presumption that he acted in the performance of his duty did not cease or disappear from the case, and it was not error to so advise the jury. And, as we have said, this portion of the charge related only to the **conduct of the deceased.** To tell the jury of the existence of such presumption, **relating solely to his conduct,** could not, we submit, have caused the jury to think that because of the existence of such presumption they could infer that the defendant had breached its duty with respect to equipping its cars. And this is particularly true in view of the charge as a whole, a matter to which we shall now refer.

II.

And we respectfully submit that this Honorable Court, in holding that this isolated portion of the charge constituted reversible error, **inadvertently overlooked and failed to apply the rule that in determining whether a charge is prejudicially erroneous, the charge as a whole is to be**

considered and not some isolated portion of it. This time-honored rule has been time and again announced and applied by this Court.

Valley Shoe Corp. v. Stout (8th Cir.), 98 F. (2d) 514, l. c. 520;
Metropolitan Life Ins. Co. v. Armstrong (8th Cir.), 85 F. (2d) 187, l. c. 194;
Pryor v. Strawn (8th Cir.), 73 F. (2d) 595, 596;
Zurich General Accd. & Lia. Ins. Co. v. O'Keefe (8th Cir.), 64 Fed. 768, l. c. 771;
S. S. Kresge Co. v. McCallion (8th Cir.), 58 F. (2d) 931, 933, 934;
Travelers Ins. Co. v. Shinkel (8th Cir.), 37 F. (2d) 254, l. c. 255;
Morgan v. United States (8th Cir.), 98 F. (2d) 473, l. c. 477.

In the instant case, when the charge as a whole is considered, it seems quite clear that that portion thereof referring to the presumption, that is, that, in the absence of evidence to the contrary, the law presumes that the deceased used the pin lifter before going between the ends of the cars, could not have had the effect of causing the jury to believe that because of such presumption as to the conduct of the deceased they could infer that the coupling device was defective, or that such presumption could have the effect of relieving the plaintiff of the burden of proving, by the preponderance or greater weight of the evidence, that the defendant did not have its car equipped with a coupler coupling automatically by impact without the necessity of men going between the ends of the cars. The Court fully and repeatedly instructed the jury as to the burden resting upon the plaintiff, and repeatedly told the jury that there was no presumption that the coupler would not couple automatically by impact. We set out below those portions of the charge relating to these matters, as follows:

"The Court charges the jury that before plaintiff may recover in this case she must prove by the preponderance or the greater weight of the evidence that the injury to and death of plaintiff's decedent were caused by the cars in question not being equipped with couplers coupling automatically by impact.

• • • • • • •

"You cannot presume that the couplers would not couple by impact, but, on the contrary, the law places on plaintiff the burden of proving such facts to your reasonable satisfaction by the preponderance or greater weight of the credible evidence.

"This burden abides with plaintiff throughout the case, and if you find that plaintiff has not proved the above facts to your reasonable satisfaction by the preponderance or greater weight of the evidence, or if you find the evidence on the subject to be evenly balanced, then in either state of events plaintiff is not entitled to recover against defendant, and your verdict must be for the defendant" (Tr. 337).

"The Court charges the jury that you cannot presume that the couplers on the cars in question would not couple automatically by impact, but, on the contrary, the law places upon the plaintiff the burden of proving such facts to your reasonable satisfaction by the preponderance or greater weight of the evidence.

"Unless plaintiff has proven such facts to your reasonable satisfaction, as above stated, then plaintiff is not entitled to recover in this case, and your verdict must be for defendant.

• • • • • • •

"The Court charges the jury in this case that the burden of proof rests upon the plaintiff to prove by the preponderance, that is, the greater weight of the credible evidence, the fact necessary to entitle her to recover, and the burden of proof does not shift from side to side, but constantly remains with the plaintiff; therefore, if you find the evidence to be evenly balanced in this case, or if you find plaintiff has not proved by the preponderance, that is, the greater

weight of the evidence, facts necessary to entitle her to recover, then your verdict must be for the defendant.

* * * * * * *

"There is no presumption in this case that the coupler would not couple automatically by impact.

"The burden of proof predominates upon plaintiff, from the beginning to the end, to prove by the preponderance of the evidence the couplers would not couple automatically by impact, and, as a proximate result thereof, plaintiff's decedent was injured and died" (Tr. 338, 339).

When the above-quoted portions of the charge are considered in connection with that portion thereof which the Court has held to be erroneous, it would seem quite clear that from the charge as a whole **any jury would be bound to fully understand just where the burden of proof lay**; that plaintiff throughout carried the burden of proving by the preponderance or greater weight of the evidence that the car in question was not equipped with a coupler coupling automatically by impact without the necessity of men going between the ends of the cars and that the injury and death of the deceased proximately resulted from such breach of duty on the part of the defendant. And from this charge as a whole **any jury would be bound to understand that they could not presume that the car was not equipped with a coupler coupling automatically by impact without the necessity of men going between the ends of the cars**, but that they must find **from the evidence** that plaintiff has proved this by the preponderance or greater weight of the evidence.

And, as we have said, there was abundant evidence, in the testimony of the brakeman, Stogner, from which the jury could find that the coupling device was inefficient and not such as the law required; **for after the accident Stogner, in order to effect a coupling, was compelled to go in between the cars and operate the knuckles by hand** (Tr.

34), after having tried to use the pin lifter (Tr. 36). And Stogner testified that if the pin lifter is working it is not necessary to go between the cars (Tr. 40).

If it may be said to have been technically erroneous to tell the jury that, in the absence of evidence to the contrary, the law presumed that the deceased used the pin lifter before going between the ends of the cars (and for the reasons stated above we submit that it was not even technically erroneous), such error, if any, was, we respectfully submit, harmless and nonprejudicial, in view of the charge as a whole.

In United States v. Wescoat, 49 F. (2d) 193, the trial judge erroneously instructed the jury that if the insured developed active tuberculosis prior to January 1, 1925, he was presumed to have contracted it while in the army. No such presumption obtained. The Court, however (l. c. 194), held that such error was harmless in view of the issues and the evidence in the case and in view of the fact that the trial court "clearly, correctly and fully charged the jury as to what constituted total and permanent disability within the meaning of the policy, charging them explicitly in this connection that, before plaintiff could recover, he must satisfy them, by a preponderance of the evidence, that he was totally disabled," etc. And the Court said:

> "In view of this charge, we do not think that the erroneous instruction that the disease was presumed to be of service origin could have prejudiced defendant; and in this respect the instant case differs from the Searls case (49 F. [2d] 224) where the presumption as to service origin was made practically determinative of the issues."

In the instant case it is entirely clear, we respectfully submit, that the presumption alluded to by the trial court in that portion of the charge which this Court has held to be erroneous, was not in any sense determinative of the

real issue involved in this branch of the case. The real issue, as to this branch of the case, was whether the defendant had its car equipped with a coupling device such as the law required. And the trial court, in its charge, over and over again told the jury, in effect, that they must determine that issue from the evidence, and that the burden was upon the plaintiff to establish such breach of duty on the part of defendant by the preponderance or greater weight of the evidence.

III.

And in this honorable court error is no longer presumptively prejudicial. On the contrary, the burden is upon the appellant to show, from the record as a whole, that an alleged error below constituted a denial of some substantial right.

In the recent case of **Morgan v. United States, 98 F. (2d) 474, l. c. 477**, this Court, in an opinion by his Honor, **Judge Van Valkenburgh**, who wrote the opinion in the instant case, said:

> "Under the law, as now declared, 'the former practice of holding an error reversible unless the opposite party can affirmatively demonstrate it was harmless is changed, and **the burden now is on the complaining party to show from the record as a whole the denial of some substantial right.**' Hall v. United States, 8 Cir., 277 F. 19, 23; Trope v. United States, 8 Cir., 276 F. 348; Salerno v. United States, 8 Cir., 61 F. (2d) 419, 424, Par. 391 (28 U. S. C. A.), amending Par. 269, Judicial Code." (Emphasis ours.)

In **Scritchfield v. Kennedy (10th Cir.), 103 F. 467**, the Court (l. c. 474) said:

> "It appears from the evidence that the verdict of the jury was proper. As a rule a judgment should not be set aside on technical grounds. When instructions are construed together as a whole, in the light of all

the evidence, the law of the case being fairly presented, under Act of February 26, 1919, amending Judicial Code, Section 269, 28 U. S. C. A., Sec. 391, requiring the Court of Appeals to look to the entire record, including pleadings, evidence, instructions and all other matters properly of record, and render judgment without regard to technical errors, the former practice of holding an error reversible unless the opposite party can affirmatively demonstrate it was harmless being changed, the burden now is on the complaining party to show from the record as a whole the denial of some substantial right." (Emphasis ours.)

In the instant case, on the issue of defendant's liability as for a violation of the Safety Appliance Act, **"the verdict of the jury was proper."** The verdict is plainly for the right party. We call the Court's attention specially to the fact that though plaintiff adduced evidence tending strongly to show that this coupling device was inefficient and not such as the law required, **the defendant, on that issue, stood mute and offered no testimony whatsoever.** After the defendant's own brakeman, Stogner, called as plaintiff's witness, had given testimony admitting of no inference other than that this coupling device was defective and inefficient (Tr. 34, 36, 40), **the defendant had not a word of testimony to offer tending to show that its coupling device was in good order and efficient.** Here is a case where a man was killed while attempting to effect a coupling between two cars. After the fatal injury, another brakeman was unable to open the knuckles by means of the pin lifter and was compelled to go between the cars to effect a coupling by hand. **And the defendant had every opportunity to inspect these cars and this coupling device after the accident and thus definitely ascertain the condition of the coupling device.** Yet defendant offered no testimony on the subject. Consequently, as said in Scritchfield v. Kennedy (103 F. [2d] 474) **"it appears from**

the evidence that the verdict of the jury was proper." And, as ruled in that case, and in Morgan v. United States, supra, 98 F. (2d), l. c. 477, and in many other cases as well, the former practice of holding an error reversible unless the opposite party affirmatively demonstrates that it was harmless, has been changed by statute, and "the burden is now on the complaining party to show from the record as a whole the denial of some substantial right." In this case the appellant had not borne that burden. When the evidence as a whole, on the issue of defendant's liability as for a violation of the Safety Appliance Act, is considered, and when the charge as a whole is considered, appellee respectfully submits that it is plain that there has been no denial to appellant any substantial right; that upon the record as a whole this judgment should be affirmed.

Appellee therefore prays that the Court grant a rehearing of this cause to the end that the things and matters hereinabove referred to may be properly and adequately presented to the Court for its consideration.

Respectfully submitted,

CHARLES M. HAY,
CHARLES P. NOELL,
Attorneys for Appellee.

Certificate of Counsel.

Charles M. Hay and Charles P. Noell, counsel of record for appellee in the above-entitled cause, do hereby certify that the above and foregoing petition of appellee for a rehearing of said cause is filed in good faith and is believed by them to be meritorious.

Charles M. Hay,
Charles P. Noell,
Attorneys for Appellee.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 15, 1940.

[fol. 437] (Order Granting Petitions for Rehearing, Vacating Judgment Heretofore Entered and Assigning Case for Hearing at the March Term, 1941.)

November Term, 1940.

Saturday, December 7, 1940.

Petitions for rehearing were filed by counsel for both parties to this cause, appellant and appellee, and after consideration thereof, It is now here ordered by the Court that said petitions, be, and they are hereby, granted.

It is further ordered by the Court that the judgment of this Court in this cause entered November 1, 1940, be, and it is hereby, vacated, set aside and held for naught, and that this cause be placed on the calendar of cases for hearing at the March Term 1941 of this Court.

December 7, 1940.

(Appearance of Mr. Wm. H. Allen as Counsel for Appellee.)

The Clerk will enter my appearance as Associate Counsel for the Appellee.

WM. H. ALLEN,
1725 Pierce Building,
St. Louis, Missouri.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 14, 1941.

[fol. 438] (Order of Submission on Rehearing.)

United States Circuit Court of Appeals
Eighth Circuit

March Term, 1941.

Monday, March 10, 1941.

Before Judges Gardner, Sanborn and Thomas.

Southern Railway Company, Appellant,
No. 11,609. vs.
Clarence A. Stewart, Administrator, etc.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause having been called for rehearing in its regular order, after granting of petitions for rehearing, the same was argued by Mr. Walter N. Davis and Mr. Arnot L. Sheppard for appellant and by Mr. Charles H. Hay and Mr. William H. Allen for appellee.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 439] (Opinion.)

United States Circuit Court of Appeals
Eighth Circuit.

No. 11,609.—March Term, A. D. 1941.

Southern Railway Company, a corporation,
Appellant,
vs.
Clarence A. Stewart, Administrator of the Estate of John R. Stewart, Deceased,
Appellee.

} Appeal from the District Court of the United States for the Eastern District of Missouri.

[April 14, 1941.]

Mr. Walter N. Davis and Mr. Arnot L. Sheppard (Mr. Wilder Lucas was with them on the brief) for Appellant.

Mr. Charles M. Hay and Mr. William H. Allen (Mr. Charles P. Noell was with them on the brief) for Appellee.

Before Gardner, Sanborn and Thomas, Circuit Judges.

GARDNER, Circuit Judge, delivered the opinion of the Court.

This was an action brought by the original appellee, Mary Stewart, widow of James R. Stewart, deceased, and the administratrix of his estate, to recover damages for injuries to and the alleged wrongful death of her husband while in the employ of appellant railroad company as a switchman. After the appeal had been perfected and was pending in this court, appellee Mary Stewart died, whereupon Clarence A. Stewart, as administrator of the estate of James R. Stewart, was substituted as appellee.

The action is bottomed upon the alleged violation of the Safety Appliance Act, and is brought under the Federal Employer's Liability Act (Title 45 U.S.C.A., Sec. 51). At the time of the accident resulting in the injury to and death of James R. Stewart, he was in the employ of the Southern Railway Company, a common carrier, as a switchman, working as a member of a switching crew in the yards of the defendant at East St. Louis, Illinois, and it is conceded that at the time of receiving his injuries he and the railway company were engaged in interstate transportation. It will be convenient to refer to the parties as they were designated in the lower court.

While engaged in coupling up certain cars on track 12, Stewart's arm was crushed by impact between the couplers of two cars which he was attempting to couple. He died two days later as the result of such injury. It was charged by the plaintiff that the defendant had violated the provisions of the Federal Safety Appliance Act, by furnishing on its line cars used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars. In addition to its general denial, the defendant pleaded affirmatively that the action had been compromised and settled for the sum of $5,000.00 and that plaintiff had executed a release and that the Probate Court of St. Clair County, Illinois had made and entered its order approving such settlement. By way of reply, plaintiff admitted that the settlement had

been made and had been approved by the Probate Cour and that a release had been signed but that such settle ment was procured by means of fraud and duress.

At the close of all the testimony defendant moved fo a directed verdict upon substantially the followin grounds: (1) there was no substantial evidence showin or tending to show that the defendant was guilty of an actionable negligence or want of duty as charged in th petition; (2) there was no substantial evidence that an want of duty of the defendant was the proximate cause o the fatal injury received by plaintiff's intestate; (3) i appears that plaintiff secured from the Probate Court o St. Clair County, Illinois, an order authorizing a settle ment by her of all claims and demands on account of in juries to her deceased husband for the sum of $5,000.0 pursuant to which she had in fact settled and satisfied al claims and executed a release, and the order and judg ment of the Probate Court of St. Clair County, Illinois was not subject to collateral attack and was binding upo the plaintiff; (4) there was no substantial evidence show ing or tending to show that the defendant, its agents o servants, were guilty of any actionable fraud or duress i procuring such settlement. The motion was denied an the court sent the case to the jury upon instructions t which certain exceptions were saved by the defendant. Th jury returned a verdict for plaintiff in the sum o $17,500.00, and thereafter defendant moved for judgmen notwithstanding the verdict, or, in the alternative, for new trial, upon the grounds set out in the motion for directed verdict and the further ground of error in th charge to the jury, besides other grounds not now materia The motion was denied and from the judgment entere defendant prosecutes this appeal.

We reversed on the ground that the court erred in in structing the jury, and remanded the case for a new tria (*Southern Railway Co.* v. *Stewart*, 115 F.2d 317). Both parties petitioned for a rehearing. The plaintiff, in its pe tition for rehearing, contended that the lower court ha

not erred in instructing the jury, while the defendant urged in its petition, that we should have sustained its contention with reference to the alleged error of the lower court in refusing to grant its motion for a directed verdict, contending that there was no substantial evidence that the deceased attempted to open the coupler knuckles by using the pin lifter, an appliance provided to operate the automatic coupler, before going between the ends of the cars which he was attempting to couple, and that there was no evidence that the coupler was defective. Upon reargument, defendant asserts two errors of the lower court: (1) the court erred in denying its motion for a directed verdict, and (2) the court erred in instructing the jury on the questions of defendant's duty and proximate cause. On this reargument the question of the insufficiency of the evidence is brought sharply to our attention, and in our view of the record, it will only be necessary to consider that question.

The statute prohibits a common carrier from using or hauling "any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of cars." The test of compliance with these requirements is the operating efficiency of the appliances with which the car is equipped. When a violation of the act is alleged as the basis of a cause of action for damages, the question is not simply whether the coupling device as originally installed conformed to the statutory requirements, or whether the carrier has exercised proper care in keeping it in condition to function efficiently, nor whether the equipment is defective in a general sense through the negligence of the carrier. It is generally held that a violation of the statute is shown by proof that cars upon a fair trial failed to couple automatically by impact. Neither of the parties here question these generally applicable tests. Having them in mind, we shall refer to the proof.

These couplers weigh some forty pounds each. When functioning properly, they will couple automatically by

impact when either one or both couplers are open, but they will not couple automatically when both knuckles are closed. As one faces the end of a car properly equipped with automatic couplers, on the left side is a pinlifting lever. Where both knuckles of the couplers are closed, it is necessary to prepare the car for coupling on impact by opening one of these knuckles. This, in a properly functioning coupler, may be accomplished by the use of this pinlifting lever, which extends to the outer side of the car, without the necessity of going between the ends of the cars.

Stewart received his injuries on February 12, 1937. He was an experienced switchman sixty years old, and the switching crew of which he was a member was doing certain switching on track number 12. This track extended east and west and was a straight track. The crew had a group of seventeen cars on this track, which were to be coupled together and then transferred to various industrial switch tracks. The engine was headed west, with all of the cars to be coupled east of it. About seven or eight of the cars, those nearest the engine, had been coupled together and were attached to the engine at the time of the accident. Stewart, with the other switchmen, was working on the north side of this track, and the engineer was on the north side of his engine. The engineer was operating under signals from Stewart. It was about 5:40 o'clock p.m. Just previous to the accident, the deceased gave the engineer a back-up signal and then a stop signal. The cars were coupled. Deceased walked back to the next car, gave the engineer another back-up signal and a stop signal, both of which were obeyed by the engineer. This left an opening between the seventh and eighth car, and there had been no effort to make this coupling by impact prior to the time the car was stopped, leaving an opening between it and the car to which it was to be coupled. After the car had been stopped pursuant to deceased's signal, he stepped into the space between the two cars and a little later the engineer heard him "holler," and although the engineer had not moved the cars that had been coupled together after deceased gave the stop signal, there was

nevertheless a collision between the two cars, and deceased's arm was crushed between the couplers of the two cars. Obviously, the car east of the opening must have been shunted west by contact with some force from the east, although the record is silent on this question, and no cause of action is predicated upon that fact.

The available pin lifter lever was on the north side of the west end of the car east of the opening. That was the only pin lifter available to the deceased on the north side of the cars in the opening between the two. It was the duty of the deceased to use the pin lifter in opening the knuckle on the car so as to prepare it for impact. *C. & O. R. Co.* v. *Charlton*, 4 Cir., 247 F. 34. There is no evidence that he did so. The engineer, who was taking his signals from the deceased, testified that, "There was no obstruction between me and him when he gave me the stop signal and went between the cars." The visibility was "pretty clear," and deceased signaled with his hand, which the engineer could see. He testified that he did not notice deceased attempt to use the pin lifter before he went in between the cars, although he was looking at deceased for signals all the time. This would seem to be proof of a negative as nearly as such proof could be made. The engineer who was in position to see and whose business it was to observe what movements the deceased made, testified that he did not see him attempt to use the pin lifter. The effective use of the pin lifter requires a visible effort which could scarcely have gone unnoticed had it been made. The knuckle to be opened weighs some forty pounds. As said by us in *Chicago, M. St. P. & P. R. R. Co.* v. *Linehan*, 66 F.2d 373:

"If plaintiff failed to operate the coupler in a proper manner, the fact of its not working would be no evidence of defect. Just how much force may be necessary in operating the pin lever in order to bring about an opening of the knuckle cannot be definitely stated. There is no accurate measuring stick. One pull of the lever might be sufficient if enough force were put behind it, and there

might be as much force exerted in one pull as in two or three. The question must be, Was there an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner, and was enough force applied to open the knuckle if the coupler was in proper condition? * * * A court cannot say that one pull upon the lever and failure of the same to respond, regardless of the force used or the manner of operation, is sufficient to show a defective coupler, nor can it say on the other hand that one pull can never be sufficient to show reasonable force."

The point we are here making is that had the deceased made the attempt to operate the pin lifter, his efforts, under the circumstances, could not have escaped the observance of the engineer who was a witness for the plaintiff. The burden of proof was, of course, upon the plaintiff. There had been no previous unsuccessful attempt to make this coupling by impact, which might have been some evidence of insufficiency or defect. It is argued that deceased was excused from any effort to prepare the coupler for impact by use of the pin lifter because it is said there was evidence that the pin lifter did not respond. This contention is based upon the testimony of the switchman Stogner. He testified as follows:

"Q. Now, after this accident, when you coupled the cars, which I presume you did, did you couple the cars after the accident?

"A. I did.

"Q. How did you open the knuckle?

"A. I opened it with my hand.

"Q. Let me ask you, Mr. Stogner, if the coupler is working automatically, or the pin lifter, is it necessary to go in between the cars to open with your hands then?

"A. No, sir."

He testified that after the accident he found both knuckles of both couplers closed.

There was no evidence of mechanical defect or insufficiency in the couplers, including the pin lifter. There was no evidence of an unsuccessful attempt to couple them

by impact when prepared for coupling. The testimony of the foreman that he opened the knuckle with his hand does not indicate that there was a defect in the coupling device. His testimony that it is not necessary to go in between the cars to open the coupler with one's hands, if the coupler or pin lifter is working automatically, adds nothing to the proof as to the condition of the couplers on these cars. It certainly does not prove that the coupler or pin lifter on this particular car did not operate satisfactorily. On cross-examination the witness was asked which knuckle he tried to open or which pin lifter he tried to use, and he answered, "The one on the north side." But he does not testify that he was unable to open the knuckle by use of the pin lifter, nor what, if any, effort he made so to do. It must be remembered that this incident occurred after the accident and after deceased's arm had been crushed in the coupler. What effort he made to open the knuckle by use of the pin lifter, or what force he applied, finds no answer in this record but is left to conjecture. Did he make "an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner," and did he make application of "enough force to open the knuckle if the coupler was in proper condition"? It does not even appear whether this "try" to open the knuckle came after the knuckle was opened or before. A very essential element is left to conjecture and speculation. "* * * where proven facts give equal support to each of two inconsistent inferences; * * * neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other * * *." *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333; *Wheelock* v. *Freiwald*, 8 Cir., 66 F.2d 694. Here, there was proof that the deceased did not use or attempt to use the pin lifter. There was no proof that this coupler upon any prior attempt had failed to couple by impact. There was no proof of mechanical defect or insufficiency but only the statement of a witness who says that after the accident he tried to use the pin lifter without stating whether the trial was successful or what effort was included therein. A verdict can not be permitted to

stand which rests wholly upon conjecture or surmise, but must be sustained by substantial evidence. *Midland Valley R. Co.* v. *Fulgham*, 8 Cir., 181 F. 91.

There being no substantial evidence to sustain the verdict, the judgment appealed from is reversed and the cause remanded with directions to grant the defendant's motion for judgment in its favor notwithstanding the verdict.

[fol. 447] (Judgment.)

United States Circuit Court of Appeals
Eighth Circuit.

March Term, 1941.

Monday, April 14, 1941.

Southern Railway Company, a corporation, Appellant,
No. 11,609. vs.
Clarence A. Stewart, Administrator of the Estate of John R. Stewart, deceased.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the Southern Railway Company, a corporation, have and recover against Clarence A. Stewart, Administrator of the Estate of John R. Stewart, deceased, the sum of ..... Dollars for its costs in this behalf expended and have execution therefor.

And it is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to grant the defendant's motion for judgment in its favor notwithstanding the verdict.

April 14, 1941.
